

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 21 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	MM Docket No. 93-176
)	
RICHARD RICHARDS)	File No. BRTTL-921116IG
)	
For Renewal for License of)	
Low Power Television)	
Station K33CG)	
Sierra Vista, Arizona)	

To: The Review Board

Reply to Exceptions

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau

Charles E. Dziedzic
Chief, Hearing Branch

Robert A. Zauner
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554

October 21, 1994

No. of Copies rec'd
List A B C D E

0411

Table of Contents

	<u>Page</u>
Table of Authorities	ii
Introduction	2
Statement of the Case	2
Questions of Law	3
Arguments	
1. Richard's felony conviction for possession with the intent to distribute marijuana and growing marijuana on federal property mandates the conclusion that he is unfit to be a Commission licensee	3
2. Where the wrongdoing was willful, frequent, recent and serious and there is no evidence in mitigation or evidence of rehabilitation, denial of Richards' application is warranted	7
Miscellaneous	9
Conclusion	10

Table of Authorities

<u>Cases</u>	<u>Page</u>
<u>Initial Decision (This Case)</u>	
9 FCC Rcd 3604 (1994)	1,2,9 and 10
<u>South Carolina Radio Fellowship</u>	
6 FCC Rcd 4823 (1991)	5,6 and 7
<u>Williamsburg County Broadcasting Corp.</u>	
5 FCC Rcd 3034 (1990)	5
 <u>Statutes</u>	
21 U.S.C. 841(a) (1)	2
21 U.S.C. 841(b) (1) (D)	2
21 U.S.C. 841(b) (5)	2
 <u>FCC Policy Statements</u>	
<u>Policy Regarding Character Qualifications in Broadcast Licensing (1986 Character Policy Statement)</u> 102 FCC 2d 1179 (1986), <u>recon. denied</u> , 1 FCC Rcd 421 (1986), <u>modified</u> , 5 FCC Rcd 3252 (1992), <u>recon. granted</u> , 7 FCC Rcd 6564 (1992)	4,5 and 7
<u>Policy Statement and Order</u> , 5 FCC Rcd 3252 (1990), <u>recon granted</u> , 7 FCC Rcd 6564 (1992)	5
 <u>Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking (Public Notice)</u> , 4 FCC Rcd 7533 (1989)	4

Reply to Exceptions

Introduction

1. On July 29, 1994, Administrative Law Judge Richard L. Sippel released his Initial Decision, 9 FCC Rcd 3604 (1994), in which he denied the renewal application of Richard Richards (Richards) for low power television station K33CG, Sierra Vista, Arizona. On October 11, 1994, Richards filed "Exceptions to the Initial Decision." The Mass Media Bureau hereby files its reply to Richards' exceptions.

Statement of the Case

2. On July 31, 1992, Richard Richards (Richards), licensee of low power television station K33CG, Sierra Vista, Arizona, was convicted of possession with the intent to distribute marijuana and cultivating marijuana on federal property in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(D) and 841(b)(5). Richards was sentenced to five years probation and seven months house arrest.

3. Commission policy is that it will not tolerate licensees who have been convicted under this nation's drug laws. After ascertaining that there were no mitigating factors present which would warrant renewal of Richards' license, the Presiding Judge concluded that Richards could not "be trusted with a broadcast license." The Mass Media Bureau supports the Initial Decision and recommends that it be affirmed.

Questions of Law

A. Given the Commission's clear warnings that it will not tolerate illicit drug trafficking by its licensees, does the felony conviction of Richards for possession with intent to distribute and growing marijuana on federal property mandate denial of his application for renewal of his license to operate low power television station K33CG?

B. Does the absence of mitigatory or rehabilitation evidence preclude a grant of Richards' renewal application?

Arguments

1. Richard's felony conviction for possession with the intent to distribute marijuana and growing marijuana on federal property mandates the conclusion that he is unfit to be a Commission licensee.

4. At pages 18-21 of his exceptions, Richards contends that his conviction for possession with the intent to distribute less than 50 marijuana plants and cultivating marijuana on federal property does not establish that he was a "drug trafficker" whose license should be revoked. Richards contends that he was not engaged in a "systematic devotion to a criminal enterprise" which amounted to an "egregious crime against society." He claims all he did was grow a few marijuana plants for his own use and that of a friend.

5. It should be noted that Richards is not claiming that he did not engage in drug trafficking. Indeed, conviction is for

possession with the intent to distribute. As part of his plea agreement, Richards agreed that he "was the owner of these plants, he knew them to be marijuana plants and he intended to distribute the plants or the processed marijuana derived from the plants to another person or persons." (MMB Ex. 2, pp. 5 and 6).

6. The Commission has repeatedly warned that it would not tolerate drug trafficking by its licensees. In its 1986 Character Policy Statement, 102 FCC 2d 1179, 1195-97, 1200-03, the Commission stated that it would not consider allegations of violations of law that had not been adjudicated by the agency with primary jurisdiction and that did not involve the applicant's proclivity to deal truthfully with the Commission. It stated, however, that it would consider nonbroadcast misconduct as prima facie evidence of an applicant's lack of honesty if the misconduct was "so egregious as to shock the conscience and evoke almost universal disapprobation." 102 FCC 2d at 1205, n. 60.

7. By Public Notice, 4 FCC Rcd 7533 (1989), the Commission put its licensees on clear and unequivocal notice that it would regard drug trafficking as a matter of the gravest concern and that, absent extenuating circumstances, it would take "all appropriate steps, including initiation of license revocation proceedings where information comes to our attention that FCC licensees or their principals have been convicted of drug

trafficking."

8. In 1990, the Commission modified its 1986 Character Policy Statement to make clear that it considers evidence of any conviction of a felony relevant to its evaluation of an applicant's character, regardless of whether the conviction involved the applicant's honesty. Policy Statement and Order, 5 FCC Rcd 3252 (1990), recon. granted, 7 FCC Rcd 6564 (1992).

9. In 1990, the Commission issued an Order to Show Cause why the broadcast license of a convicted drug dealer should not be revoked. Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034 (1990). The licensee in that case had been convicted of possession of cocaine with intent to distribute and conspiring to commit that offense. The Commission held that:

Felonious drug trafficking, which involves systematic devotion to a criminal enterprise, has produced according to the President of the United States, "the gravest domestic threat facing our nation today." ... A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of the vast and important discretion that this agency entrusts to licensed broadcasters.

5 FCC Rcd 3035. Subsequently, on appeal, the Commission affirmed the Initial Decision, 6 FCC Rcd 340 (1991), and concluded that "in light of [the licensee's] criminal activities it would disserve the public interest to permit him to keep his license." South Carolina Radio Fellowship, 6 FCC Rcd 4823 (1991). In so

holding, the Commission stated that "the drug conviction is itself sufficient basis for revocation...." 6 FCC Rcd at 4824.

10. Richards, at pages 21-22 of his exceptions, attempts to distinguish the facts in Radio Fellowship from the facts in this case. Richards notes that the controlling principal in the Radio Fellowship case had been convicted of possessing cocaine with the intent to distribute and of conspiring to commit that offense, for which he had been sentenced to five years in prison. By contrast, Richards claims, he was convicted of growing thirty-eight marijuana plants of which "only" 19 were usable and he was only sentenced to probation and seven months house arrest. In effect, what Richards is arguing is that the Commission should distinguish between large and small drug traffickers. The Commission, however, has never made such a distinction. In its Public Notice, 4 FCC Rcd 7533, the Commission stated that "absent extenuating or mitigating circumstances, the Commission intends promptly to take all appropriate steps, including initiation of license revocation proceedings, where information comes to our attention that FCC licensees or their principals have been convicted of drug trafficking." Richards' conviction, regardless of the number of plants involved or the number of persons to whom he intended to distribute his illegal drugs, standing alone, warrants his disqualification under this Public Notice.

11. In the instant case, Richard Richards, like the licensee in the Radio Fellowship case, was found guilty of violating the provision of the federal criminal code which prohibits the possession of a controlled substance with the intent to distribute it. Like the licensee in Radio Fellowship, Richard Richards was placed under arrest and served a period of incarceration (Richards' incarceration was in the form of house arrest). Given the Commission's clear warnings that it will not tolerate illicit drug trafficking by its licensees, it must be concluded that Richard Richards does not possess the requisite qualifications to be a Commission licensee.

2. Where the wrongdoing was willful, frequent, recent and serious, and there is no evidence in mitigation or evidence of rehabilitation, denial of Richards' renewal application is warranted.

12. At pages 22-23 of Richards' exceptions, Richards contends that "[t]he record contains ample evidence of mitigation and rehabilitation." The Bureau disagrees. The factors the Commission will consider in weighing misconduct are the willfulness, frequency, currentness, and seriousness of the misconduct. 1986 Character Policy Statement, 102 FCC 2d at 1227-

28. Here, there can be no dispute. Richards willfully cultivated marijuana with the intent to distribute it and was, himself, a heavy user of marijuana (See page 11 of Richards' Exceptions: "Richards was a heavy user of marijuana."). Every time Richards "lit-up" he knowingly violated the law.

Furthermore, Richards' violations are current. He was arrested

on July 25, 1991 and convicted in July 1992. Finally, it is clear that the Commission considers "drug trafficking" by its licensees to be a serious matter. Thus, on every element that the Commission has said it will consider in evaluating the likelihood of future misconduct, Richards' conduct is wanting.

13. Richards' claim that he has been rehabilitated rests heavily on the fact that he has not used drugs since December 31, 1991. (Exceptions, pages 22-23). While it is true that he has not used drugs since that time, the motivation for his forbearance may be other than his rehabilitation. Since January 1992, Richards has been subject to random drug tests administered by his probation officer and the courts. (Tr. 105-08). Thus, the more likely explanation for Richards not using illegal drugs since December 31, 1991, is his fear of incarceration. This conclusion is supported by the fact that Richards continued to use marijuana even after his arrest on July 25, 1991 (Tr. 114). As a consequence of his continued use, Richards tested positive for marijuana on February 10, 1992 and on March 5, 1992. (Tr. 108). In sum, the evidence here is that Richards did not give up his use of marijuana until compelled to do so under the threat of going to jail.

Miscellaneous

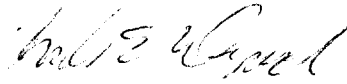
14. At page 11 of his exceptions, Richards excepts to the failure of the Initial Decision to credit his claim that he had cooperated with the Drug Enforcement Agency (DEA) to apprehend Mexican drug smugglers. At footnote 15, Richards states that Bureau counsel had, in a conversation with his counsel, confirmed that Richards did work for the DEA. Richards is correct. In conversations with DEA officials located in Arizona, Bureau counsel learned that Richards had assisted the DEA in the apprehension of Mexican drug smugglers. Consequently, Bureau counsel did not seek to impeach Richards' testimony on this matter.¹ This does not alter the fact that Richards was himself found guilty of possession of marijuana with intent to distribute and it is this conviction that renders him unfit to be a Commission licensee.

¹ Also, as a miscellaneous matter, the Bureau notes that at page 6 of his exceptions, Richards relies on "MMB Ex. 1." This exhibit was rejected by the Presiding Judge. Tr. 41.

Conclusion

15. The Initial Decision in this case should be affirmed and Richards' application for renewal of low power television station K33CG, Sierra Vista, Arizona, should be denied.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Charles E. Dziedzic
Chief, Hearing Branch



Robert A. Zauner
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W.
Suite 7212
Washington, D.C. 20554
(202) 632-6402

October 21, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 21st day of October 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Reply to Exceptions"** to:

Gerald P. McCartin, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, NW
Washington, DC 20036-5339


Michelle C. Mebane